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72-6641

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973 NO.

UNITED STATES OF AMERICA

-v-

LOUIS MARTIN AGNES, Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT F. SIMONE, Esquire
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Phila., Penna. 19102

RESPONSE NOT PRINTED

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DISCUSSION OF LOWER COURT OPINIONS

Defendant's Petition for Writ of Certiorari cites two rulings by the Trial Court as constituting errors of sufficient magnitude to warrant the attention of the nation's highest tribunal: First, is the denial of the defense motion for either a continuance or a change of venue to avoid the effect of prejudicial pre-trial publicity. The motion was initially denied in an unpublished oral Opinion delivered by District Court Judge HIGGINBOTHAM in Open Court on August 14, 1972 (the Opinion appears at page 113A to 121A of the Appendix to appellant, AGNES' Brief in the Third Circuit Court of

Appeals; hereafter in this Petition the District Court record will be cited by the pagination of the Court of Appeals Appendix and a copy of that Appendix will be forwarded with the Petition). In post-trial motions, the defense asserted the denial of a continuance as reversible error and JUDGE HIGGINBOTHAM rejected that argument in an unpublished Order without Opinion dated October 12, 1972 denying defense motions for a new trial and in arrest of judgment. Again in the Third Circuit Court of Appeals, the defense briefed and argued the question of prejudicial pre-trial publicity. The three-judge panel hearing the appeal (SEITZ, Chief Judge, and ALDISERT and ADAMS, Circuit

Judges) affirmed the conviction and sentence by Judgment Order without Opinion dated March 20, 1973. That Judgment Order has yet to be published in the Federal Reporter.

The second error warranting certiorari relief was the trial court's ruling to admit evidence of other "contraband" allegedly possessed by the defendant. The issue first arose at trial on August 16, 1973 when, during the redirect examination of United States Customs Agent McCLUNG, the Government sought to admit evidence of other "contraband" found by McCLUNG in the AGNES home and defense counsel immediately recorded an objection (231A). JUDGE HIGGINBOTHAM ruled the

evidence admissible and charged the jury as to the purpose of its admission (248A-249A). Like defendant's claim of prejudicial pre-trial publicity, this objection to "contraband" evidence was rejected in the October 12, 1972 Order denying motions for a new trial and in the March 20, 1973 Judgment Order of the Circuit Court of Appeals affirming the conviction.

JURISDICTIONAL STATEMENT

The Supreme Court's appellate jurisdiction in this matter rests upon 28 U.S.C.A. § 1254 which reads in pertinent part:

> §1254. Courts of appeals; certiorari; appeal; certified questions
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

STATEMENT OF QUESTIONS PRESENTED

I. WHEN THE TRIAL COURT REFUSED TO ORDER CHANGE OF VENUE OR CONTINUANCE AND HELD THAT SUCH RELIEF WAS AVAILABLE ONLY WHEN PRE-TRIAL PUBLICITY WAS SO PERVASIVE THAT EITHER "PER SE THE ARTICLES WOULD INFLUENCE OR PREJUDICE AN ENTIRE JURY PANEL [emphasis added]" OR "IT WOULD BE IMPOSSIBLE OR IMPROBABLE ... [to have a fair trial]", DID THE TRIAL COURT GRAVELY LIMIT DUE PROCESS PROTECTION AS ENUNCIATED IN UNITED STATES SUPREME COURT AND NUMEROUS COURTS OF APPEALS CASES?

II. IS THE TRIAL COURT'S RULING THAT EVIDENCE OF UNNAMED "CONTRABAND" MAY BE ADMITTED TO PROVE A VIOLATION OF FEDERAL STATUTES PROSCRIBING POSSESSION OF COUNTERFEIT MONEY SO COMPLETELY INCONSISTENT WITH THE DUE PROCESS PROHIBITION OF ARBITRARY INFERENCE BY THE FACTFINDER AS TO REQUIRE THIS COURT'S CORRECTIVE INTERVENTION?

SUMMARY OF FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS IN ISSUE

Defendant's contention that the trial court's rulings subjected him to prejudicial pre-trial publicity is supported by the due process clause of the Fifth Amendment to the United States Constitution, U.S. CONST. amend. V. The amendment reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall pri-

> vate property be taken for public use, without just compensation. [emphasis added]

The italicized portion of the amendment includes the due process guarantee. Prejudicial pre-trial publicity is also violative of the Sixth Amendment's Confrontation Clause, since the rumor, speculation and innuendo reaching the jury through news media is never subject to cross-examination. The Sixth Amendment, with the Confrontation Clause italicized, reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; <u>to be</u>

> confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defence. [emphasis added]

The petitioner's second ground in support of Certiorari, introduction of evidence of "contraband", rests upon the same italicized portions of the Fifth and Sixth Amendments which are set out above. The violation of the Fifth Amendment is two-fold: First, the disputed evidence was introduced in order to permit the jurors to infer, from alleged possession of illegal, but unidentified "contraband", that defendant possessed counterfeit money with fraudulent intent; such an inference is arbitrary and unreasonable and therefore a denial of due process. Second,

the Government reasoned that the defendant's failure to mention the existence of the unnamed "contraband" after officers executing a search warrant entered his home, followed the defendant to the place where he indicated that the counterfeit bills were to be found, placed the defendant under arrest and initiated custodial interrogation of the defendant, all constituted an admission of fraudulent intent, even though the admission arise from silence, rather than from verbal expression; the great weight of authority in this Court and lower federal courts, however, holds that the Fifth Amendment ban on compulsory self-incrimination prohibits not only compelled verbal admissions, but also eliciting tacit admissions by sub-

jecting a person to interrogation so phrased as to make silence appear to demonstrate guilt. Introduction of the tacit admissions at issue violated the Sixth Amendment right to counsel since the inculpatory communications resulted from interrogation conducted without warning the arrested defendant of his right to counsel and under circumstances which led the defendant to reasonably believe that a request to speak with an attorney would be ignored. Finally, the "contraband" evidence was admitted in violation of the Fourth Amendment prohibition on unreasonable search and seizure. The amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,

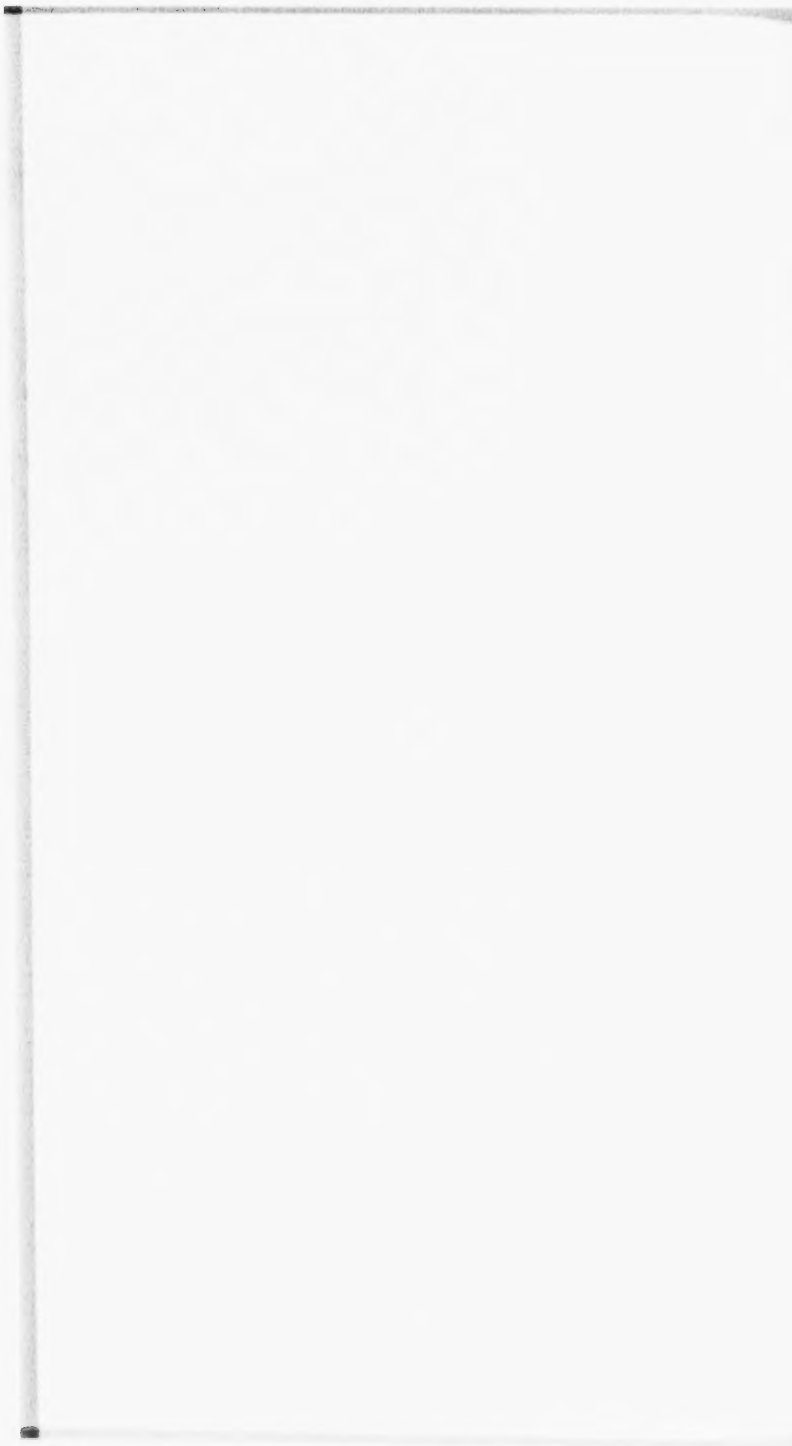
> and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

When defense counsel attempted to suppress the alleged "contraband" evidence at pre-trial proceedings, the Government objected strenuously that such evidence was irrelevant. The trial court concurred but left the Government an option to brief and argue the propriety of the seizure of the 'contraband' within one week; and the court emphasized that failure to raise the issue during the alotted time would forever bar the admission of the disputed evidence.

STATEMENT OF THE CASE

On Friday evening, February 11, 1972, Philadelphia Police, armed with a search warrant, rang the doorbell at the home of defendant, LOUIS MARTIN AGNES, announced their presence, and were admitted by the defendant "after a few seconds." (12A) Within moments, the police found counterfeit bills scattered about the third-floor bathroom (13A) and, after dismantling some plumbing and heating apparatus, discovered about five thousand dollars worth of counterfeit $ 20.00 bills (14A-15A).

When that illicit currency was discovered, the Philadelphia Police immediately summoned United States Customs special agent JAMES J. McCLUNG, by directing a radio call to Agent,



McCLUNG, who was waiting just outside the defendant's home (199A-200A). McCLUNG had met with the defendant in secret as far back as December 20, 1971 (201A). At those meetings, the Customs Agent had promised AGNES special consideration in return for the defendant's efforts to supply McCLUNG with substantial amounts of narcotics, counterfeit currency or securities, and other contraband sought by the United States Customs Bureau, Secret Service, Federal Bureau of Investigation, or other federal law enforcement agencies; the defendant was to reveal the source of the contraband to aid federal authorities in initiating new prosecutions(201A-203A). Consistent with this arrangement, the defendant greeted McCLUNG when the agent arrived

at the search scene and said "I got this five thousand dollars for you" (201A). The defendant explained that he had been calling McCLUNG throughout the work-day preceding the search(202 A) and that he had written a note to McCLUNG which note could be found in the kitchen of defendant's home waiting to be mailed (203 A). At this point, Agent McCLUNG, notwithstanding the secret agreement with AGNES into which he testified to entering, said to AGNES: "Bullshit" (202 A), and directed Philadelphia police to arrest the defendant.

Since the very moment when AGNES confronted McCLUNG, he has steadfastly maintained that his possession of counterfeit money was without fraudulent intent and solely pursuant to his agreement with McCLUNG (see, e.g., 449A-450A).

Yet, McCLUNG'S refusal to acknowledge that agreement on February 11, 1972 before the Philadelphia Police Officer's presence permitted the initiation of these criminal proceedings with the eventual result that AGNES has been sentenced to five years imprisonment (451A-452 A), without benefit of bail pending appeal (408 A-419A); (453A-454A).

The Philadelphia Policemen, lead by LT. ISRAEL SPAN, had entered the defendant's home on February 11, 1972 with a search warrant signed by Common Pleas Judge SPAETH (4A). The affidavit to the warrant, subscribed to by LT. SPAN, stated that a confidential informant of known reliability had notified police that the defendant, on

the day immediately preceding the search, had received a shipment of a full pound of methamphetamine hydrochloride along with assorted handguns (5A-6A).

When police entered the AGNES residence, they first found the counterfeit bills which form the basis of this prosecution (13A-14A). Subsequent to that discovery, police proceeded to ransack the defendant's closet (15A), assorted personal papers including motor vehicle registration (20A), business records and ledgers (17A), trace amounts (18A-19A) of narcotic drugs (sufficient to indicate the fact that defendant does have, and has never denied having, a drug problem), and reels of magnetic tape (18A).

Defendant was subsequently served with a two-page, singled-spaced inventory of all items seized (7A-8A).

In addition to searching the defendant's entire home, police officers searched the persons of defendant's fiancee (21A), and of all who visited the home during the search (24A); further, police confiscated the automobiles of all those who were present in defendant's home at any time during the search (23A).

Following a preliminary hearing held on February 18, 1972 in Pennsylvania Common Pleas Court (9A-52A), defendant was charged with state crimes for possession of counterfeit money and possession of several quantities of illegal drugs. On February 29, 1972, the Federal Grand Jury returned

an indictment (53A-54 A) charging the defendant with violation of Sections 472 and 473, Title 18 U.S.C.A., i.e., possession of the same counterfeit money which was the subject of the state indictment.

On May 23, 1972, a hearing on pre-trail motions was held before HONORABLE A. LEON HIGGENBOTHAM. Defendant's contention that the fruits of the search should be suppressed because there was no probable cause to support the warrant and because the police extended their search beyond the scope of the warrant were rejected. However, in response to the defense's assertion that the Government should be compelled to disclose the name of the informant, and the defense' request

that the propriety of seizing all items seized in the search besides the counterfeit money should be litigated, the Court made the following rulings:

(1) That the Government would be ordered to produce, within forty-eight hours, a confidential memorandum for in camera inspection only in which the name of the informant along with facts demonstrating his reliability would be recited (102A).

(2) That the Government would be required to present memoranda and argument supporting the admissibility of all physical evidence seized (besides counterfeit money) before such evidence could be offered for admission (109A-110A).

As the date for trial approached,

the Government informed the Court that it would refuse to disclose the identity of its informant, even for in camera inspection (111A-112A). Over defense objection, the Court ignored this deliberate defiance of judicial process.

On August 7, 1972, MARTIN ALLEN HESS, a character peripherally connected with this case was murdered by explosion of his automobile. Extraordinary nationwide publicity followed the HESS murder. Despite the fact that, for a week before and after the killing, AGNES was vacationing in California and maintaining regular and routine telephonic communication with his attorney, the press - as the news articles submitted for consideration

by the Trial Court will demonstrate (124A-141A) - had designated the defendant as the murderer. The veniremen who were to decide the defendant's fate on August 14, 1972 awaited impanelment on the fourth floor of the Federal Courthouse from August 7th to 11th in a jurors assembly room strewn with issues of the local paper in which the "mysterious disappearance" of AGNES was linked with HESS' death. On August 14, 1972, defense motions for a continuance or change of venue pending abatement of pre-trial publicity were denied in an oral opinion (113A-121A).

At trial on August 15 and 16, 1972, the Government was permitted to introduce evidence of all physical objects seized in defendant's home ,

notwithstanding the earlier ruling that the propriety of the seizure of that evidence would have to be demonstrated by the Government before such evidence could be used at trial. The jury returned with a verdict of guilty on one of the two counts in the indictment, and, upon Government motion (359A-361A), and after a hearing (362A-405A), bail was revoked (408A-419A).

Defendant's post-trial motions (420A), were denied (430A), and the defendant was sentenced to five years imprisonment on November 8, 1972.

On November 10, 1972, notice of appeal was filed in the Court of Appeals for the Third Circuit.

ARGUMENT

I. BY REFUSING TO ORDER EITHER A CONTINUANCE OR A CHANGE OF VENUE IN ORDER TO MITIGATE THE EFFECT OF AN EXTRAORDINARY NATIONWIDE SPATE OF PRE-TRIAL PUBLICITY, WHICH WAS BOTH PREJUDICIAL TO THE DEFENDANT AND ALSO EFFECTIVELY IMMUNE FROM ATTACK BY CROSS-EXAMINATION AT THE TRIAL, THE DISTRICT COURT MADE GRAVE INROADS INTO THE FIFTH AMENDMENT GUARANTEE OF DUE PROCESS AND THE SIXTH AMENDMENT RIGHT OF CONFRONTATION.

A. PROFUSE PUBLICITY DURING THE WEEK PRECEDING THIS TRIAL EXPRESSLY DESIGNATED DEFENDANT, LOUIS MARTIN AGNES AS THE MURDERER OF MARTIN HESS.

The Lower Court record reveals a selection of newspaper articles from the local press dealing with the murder of MARTIN HESS on August 7, 1972. In these articles, the defense has highlighted passages which deal expressly with LOUIS MARTIN AGNES. It is

apparent from reading these passages that the press clearly and without preservation declared the defendant to be a killer. The articles cited expressly state the following points (124A et seq.):

(1) That the deceased, MARTIN HESS, lived in fear that he would be murdered by defendant.

(2) That MARTIN HESS would have been the chief witness for the Government in this action had he lived.

(3) That LOUIS MARTIN AGNES was immediately suspected by law enforcement authorities to be the murderer of HESS.

(4) That PAUL RUBIN and JOSEPH CONTI were targets of the same blast and were intended victims of MR. AGNES in the

future.

(5) That MR. AGNES mysteriously disappeared from the Philadelphia area shortly after the death of MARTIN HESS.

(6) That MR. AGNES had been inquiring amoung criminals as to the availability of a gun with a silencer and explosives.

(7) That AGNES was finally cornered by police and forced to surrender himself for questioning regarding HESS' death.

Each such allegation was scandalous, inflammatory, and utterly untrue.

B. THE COURT PRESENTED NO AUTHORITY SUPPORTING ITS TEST OF PUBLICITY SUFFICIENTLY PREJUDICIAL TO REQUIRE CONTINUANCE OR CHANGE OF VENUE.

The Court misconstrued defendant's Motions as an attempt to seek injunctive restrictions on the press (114A-115A). In fact, the defense was seeking only measures to insure an impartial fact-finder by insulating the jurors from the intense and inordinately damaging publicity leading up to the trial; the defense sought relief in the form of a continuance or a change of venue.

The Court rejected the defendant's request and stated that "there is no basis to find that per se the articles would influence or prejudice an entire jury panel so that it would be impossible or improbable to find 12 representative jurors to act calmly,

deliberately and fairly decide the issue as to whether the Government has met their burden of proof beyond a reasonable doubt on each and every material element of the case." The Court relied for this test on the authority of Dessus v. Commonwealth of Pennsylvania, 316 F. Supp. 411 (1969) and United States v. Caverly, 408 F. 2d 1313 (1970). The defense respectfully submits that neither of those two cases provides such a restrictive test of publicity so adverse as to threaten fair trial. The District Court in Dessus states that a trial judge should grant a continuance or a change of venue whenever he reasonably believes that the extent of pre-trial publicity threatens the defendant's right to due process.

In fact, in that case, the Motion for Continuance was denied; however, in Dessus, unlike the instant case, the publicity at issue was over a year old and the publicity was exclusively related to the crime for which the defendant had been charged. Therefore, the chance of prejudice was small and the defendant had an opportunity to present his case and confront the Government's case in Court. Thus, Dessus and Caverly, far from expounding a restrictive test for publicity sufficiently prejudicial to warrant a continuance or change of venue, follow the sense of recent landmark Supreme Court decisions in prescribing a liberal mandate to trial judges to order whatever relief is necessary in order to insulate the

fact-finder from potentially biased media coverage. For example, in Sheppard v. Maxwell, 384 U.S. 333 (1966), the Court states that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the Judge should continue the case until the threat abates or transfer it to another County not so permeated with publicity." See In Accord Estes v. Texas, 381 U.S. 532.

Defendant, AGNES, faced trial on August 14, 1972, after a full week of front-page newspaper coverage accusing him of the murder of MARTIN HESS and implying that AGNES intended further homicides in order to eliminate Government witnesses against him. In the typical case where refusal of a continuance is appealed,

the circumstances surrounding the very same crime for which the accused is charged have been exaggerated or distorted by the press; insulating the jury from publicity promoted a just verdict by eliminating those allegations, however much bandied about the papers, which were refuted by cross-examination or by the defense's independent evidence. In the case of LOUIS MARTIN AGNES, on the other hand, the news media accused the defendant of a crime different from that for which he was to stand trial. As terrible as these allegations were, they were "irrelevant" to the prosecution for counterfeiting and, therefore, utterly immune from confrontation by the defense. Clearly, in the instant case, the Court's sedulous warnings that the

jurors avoid all media exposure, unaccompanied by a proceeding in which the defendant might refute the accusations already widely publicized, failed to salvage a fair hearing; in fact, those warnings served to protect the jury's preconceived notion that the defendant was an accused killer against contradiction by newspaper or broadcasting reports from which the factfinder was sequestered. Had the Judge granted him a mere two-week continuance, AGNES would no longer have been a suspect. His uninvolvement with the HESS killing would have been established and his right to a fair trial preserved. Under applicable law, the refusal of continuance was a clear abuse of discretion.

II. THE TRIAL COURT ADMITTED HIGHLY PREJUDICIAL TESTIMONY AS TO THE DEFENDANT'S ALLEGED POSSESSION OF UNNAMED "CONTRABAND" IN DEFIANCE OF THE FACT THAT SUCH EVIDENCE WAS UTTERLY WITHOUT PROBATIVE FORCE AS TO AGNES' GUILT OF THE CRIME FOR WHICH HE WAS BEING TRIED, AND, THEREFORE, IN CONTRAVENTION OF THE FIFTH AMENDMENT DUE PROCESS GUARANTEE.

The whole issue of the improper admission of evidence of contraband first arose when defense counsel asked Customs Agent McCLUNG whether it was possible to infer that defendant, LOUIS MARTIN AGNES possessed the counterfeit money at issue without the intent to defraud:

"Q. So as of the time that you were looking for the number you still believed that it was possible that he was telling the truth?

A. At that time it was possible, yes.

Q. And since that time you have

changed your mind?

A. Yes.

Q. And one of the reasons that has caused you to change your mind is that you couldn't find the number?

A. This is one of the reasons, yes." (226A-227A)

In response to this testimony, the United States Attorney argued that counsel for the defense, by asking the witness for his reasonable interpretation of the facts which he saw, "opened the door" to the issue of intent, that the only remedy for such a transgression was to permit the Government to introduce evidence of "contraband" allegedly secreted in the defendant's home, regardless of whether such evidence was unconstitutionally seized or otherwise

inadmissible, and that the failure of the defendant tomake an exculpatory statement when the "contraband" was discovered supported an inference that MR. AGNES possessed the counterfeit money with an intent to defraud. The Court accepted the Government's argument (234A), permitted Agent McCLUNG to testify as to what "contraband" he believed was found in defendant's home (244A, et seq.), and attempted both when the evidence went in (248A et.seq.) and in the charge to the jury (320A) to salvage this evidentiary ruling with limiting instructions. There are no less than three (3) reasons why the testimony of Agent McCLUNG and the Court's accompanying instructions constitute evidentiary or constitutional error:

A. ADMISSION OF AGENT McCLUNG'S TESTIMONY VIOLATED THE DEFENDANT'S RIGHTS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, (1) BY SUBJECTING THE DEFENDANT TO AN IMPROPER EVIDENTIARY INFERENCE IN VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS, (2) BY DECLARING SILENCE AS AN INCULPATORY ADMISSION CONTRARY TO THE BAN ON COMPULSORY SELF-INCRIMINATION, AND (3) BY PRESENTING THE JURY WITH HIGHLY PREJUDICIAL AND INFLAMMATORY MATTER DESPITE THE PROHIBITION ON SUCH EVIDENCE INHERENT IN THE DUE PROCESS CLAUSE.

1. EVIDENTIARY INFERENCE CONTRARY TO DUE PROCESS.

The United States Supreme Court in the decision of Leary v. United States, 395 U.S. 31, 89 Supreme Court 1532 (1969) stated that an evidentiary inference must be regarded as "irrational" or arbitrary" and hence unconstitutional unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow

from the proved fact on which it is made to depend. In the charge to the jury, the Court permitted the fact-finder to infer MR. AGNES' intent to defraud from the possession of unnamed "contraband" in his house. In fact, if this Court scrutinizes the nature of "contraband" found in the AGNES home, it will be apparent that possession of such items is completely unrelated to the defendant's intended disposition of the counterfeit money. In other words, it would be "irrational" to state that possession of that "contraband" could support an inference of intent to pass publish or otherwise use counterfeit money to defraud.

Specifically, the Government cited three articles of contraband allegedly re-

moved from a cabinet in the defendant's bathroom. Taking each of these items, one at a time, it will appear that not one of them could possibly support a finding of criminal intent on the part of the defendant:

(1) The .38 calibre Cobra Colt revolver was either lost by or stolen from a Philadelphia policeman in 1968. The only testimony in any proceedings relevant to this gun was to the effect that the policeman who owned it discovered it "missing" when he returned home from vacation (16A, 35A). Therefore, there is no evidence that the gun was stolen; and furthermore, the unequivocal implication of those cases which have construed Leary as applied to the inference of guilty knowledge based

upon recent possession of stolen guns, is that mere possession of a stolen handgun will not support an inference of knowledge that the gun was stolen. See, e.g. Commonwealth v. Owens, 441 Pa. 318 (1970). Thus, the jury may not infer that LOUIS MARTIN AGNES had any reason to know that the handgun was stolen or to call that handgun to the attention of Agent McCLUNG.

(2) The Government's evidence disclosed that in addition to the gun, there appeared in the bathroom compartment approximately 1.74 ounces of marihuana, 1/10th of an ounce of hash, and 1/448th of an ounce of methadrine. Clearly, in fact, these quantities of illegal substances characterized the defendant as a user of drugs. However,

such miniscule quantities could not possible indicate that the defendant is a dealer in such substances. Therefore, it would be unreasonable to assume that the defendant would surrender to Agent McCLUNG drugs which he held for his personal consumption when Agent McCLUNG had made it clear that he was strictly interested in large quantity trafficking in "contraband". The amount of drugs involved here is so small that the defense challenges the Government to deny that, were federal agents to seize such a quantity, the United States Attorney would, in fact, discharge the resulting criminal case or dispose of it in a summary proceeding. Thus, it is improper to permit thejury to infer an intent to defraud from the

possession of these drugs.

(3) Other items found in the mirror-cabinet in MR. AGNES' bathroom included ledger books, airplane tickets, credit cards, and documents of title to motor vehicles. None of these items can have any probative force pointing towards MR. AGNES' guilt, since every such item, each of which is neither cited on the search warrant nor reasonably likely to be "contraband" nor even proven to be "contraband", was seized in violation of the Fourth Amendment prohibition of unreasonable searches (See III infra) The defense's contention that the actual "contraband" recovered was erroneously admitted into evidence has really been understated. The fact is that the Government's evidence failed even to state

the precise nature of the "contraband". It is obvious that no fact-finder can infer intent, plan, motive, or scheme, from knowledge that the defendant was in possession of something, without know ing what that thing really is. Thus, regardless of whether the Court had admitted evidence of the precise nature of the "contraband" the defendant's right to due process and a fair trial has been breached by permitting an inference which runs contrary to logic.

2. TACIT ADMISSIONS

The defense respectfully submits that it is Hornbook Law, that no defendant can be compelled to incriminate himself. See Griffin v. California, 380 U.S. 609 (1965) and Malloy v. Hogan, 378 U.S. 1

(1964), and Commonwealth v. Dravecz, 424 Pa. 582 (19).

In this case, the defendant was subject to an inference of fraudulent intent based upon silence in the fact of his accusers. Cases construing the ban on compulsory self-incrimination have unequivocally forbidden tacit admissions as evidence against the defendant, See e.g. U.S. Ex Rel Staino v. Brierly (E.D. Pa. 1967) 387 F 2d 597. The logic of these cases could be overwhelming if this Court will consider that , by the Government's own evidence, DETECTIVE SPAN had warned LOUIS MARTIN AGNES of his right to remain silent, just a short time before the discovery of the "contraband" in dispute here (155A). It would be inconceivable for the Govern-

ment or its agents to first warn the defendant of his right to remain silent and then assert his silence as inculpatory.

3. INFLAMMATORY JURY INSTRUCTIONS

The Court, in its attempt to prevent a mistrial cautioned the jury (248A-249A) that the evidence of other "contraband" was both highly prejudicial and 'rather involved' and "intricate." In fact, the Court strenuously attempted to confine the jury's consideration of this other "contraband" to "a very limited purpose, a very limited purpose" (Id. 106). Nevertheless, independent evidence of criminal behavior (particularly in a case like this where the behavior is unspecified and left to the jury's imagination - assisted by their cog-

nizance of massive pre-trial publicity from the week before) is so persuasive that admission of such evidence is a per se deprivation of due process whenever, as here, that evidence is not subject to confrontation. See Bruton v. United States, 391 U.S.123 (1968); Pointer v. Texas, 380 U.S. 400 (1965) and Douglas v. Alabama, 380 U.S. 415 (1965). In each cited case, the prejudicial evidence was admitted pursuant to a hear-say exception. Yet, the Supreme Court declared that "there are some contexts in which the risks that the jury will not or cannot follow instructions is so great and the consequences of violation so vital to the defendant that the practical and human limitations of the jury system cannot be

ignored." See Griffin, supra. In this case, Agent McCLUNG'S testimony that "contraband" was found, is purehearsay, not admissible under any exception (See II, sub-part B, infra) and, therefore, even more subject to potentiality for abuse of the fact-finding process. Furthermore, the defense's contention that testimony as to the existence of "contraband" which defendant AGNES failed to reveal was intended by the Government not merely to be probative of the defendant's intent but rather to compel a jury finding of guilt is supported by the United States Attorney's statement in closing argument that (288A) the existence of "contraband" is the "most significant part of the testimony".

B. THE EVIDENCE OF OTHER CONTRABAND WAS ADMITTED CONTRARY TO APPLICABLE RULES OF EVIDENCE.

1. THE EXISTENCE OF OTHER CONTRABAND WAS NOT ADMISSIBLE WITHIN THE EXCEPTION FOR PRIOR SIMILAR ACTS TENDING TO PROVE PLAN, MOTIVE, INTENT OR DESIGN. Commonwealth v. Peterman, 430 Pa. 627.

The instant case is distinguishable from any of the cases which the Trial Court cited as authority for admission of Agent McCLUNG'S testimony as to contraband found in MR. AGNES' home, since the evidence of independent criminal acts is so unrelated to the crime charged that it utterly failed to prove or to tend to prove any material element of that offense. Consider that in Nye and Nisson v. United States 336 U.S.

613 (1949), the crime charged was submission of false invoices to the War Shipment Board and prior acts proffered by the Government consisted of invoices fraudulently submitted in an analagous manner to the same Government agency by the same defendants. Again, in Lisenba v. California, 314 U.S. 219 (1941), the prior act offered as evidence of intent was so incredibly similar to the crime charged as to have extraordinary probative force. In that case, the defendant was charged with marrying his wife and then killing her in order to collect her insurance. The State sought to prove that he arranged for her death by multiple rattlesnake bites, which the defendant hoped would appear accidental. It is hardly surprising that the Court held that evidence of

the "accidental" death of the defendant's heavily insured first wife, by drowning in her bath tub, would support an inference that the defendant was acting pursuant to a homicidal scheme or plan. Finally, the Court cited United States v. Hayes (5 Cir., 1971) 444 F 2d 472 where, again, the prior acts admitted into evidence were strikingly similar to the transgressions for which the defendants were tried. Certainly, evidence that the defendants bombed the house purchased by a negro woman in a white neighborhood and placed "booby traps" in a Negro residential neighborhood would lead a reasonable man to recognize a plan to perpetrate systematic racist violence, which plan would be clearly relevant in a prosecution for bombing a school bus full of Negro children.

The defense pleads its utter inability to find an analogy between these cited cases and the instant case. It is difficult to understand how possession of very small amounts of marijuana-derivative drugs and trace amounts of "dangerous" drugs can be regarded as a "similar act" to possession of quantities of counterfeit money substantial enough to permit wholesale trafficking.

2. IN ORDER FOR THE COURT TO PROPERLY ADMIT PRIOR SIMILAR ACTS INTO EVIDENCE, THE EXISTENCE OF THE ACTS AT ISSUE MUST INDICATE "MORE LIKELY THAN NOT" THE EXISTENCE OF THE ACTS TO BE PROVED. Leary, supra.

Significantly, the Trial Court's authority for admitting evidence of "contraband" predates Leary. While the two Supreme Court cases cited as authority for admitting testimony of other contraband rest

only on the evidentiary issue of relevance, the lesson of Leary is that an inference based upon prior similar acts must pass a strict due process test of probative force. Furthermore, HAYES, the lone post-Leary case favoring admissibility involves such a brutal crime, providing such incentive for admission of any inculpatory evidence, that the Court should not seriously offer that case as a strict standard for admissibility of prior criminal acts.

3. AGENT McCLUNG'S TESTIMONY FAILS TO QUALIFY AS AN EXCEPTION TO THE HEARSAY RULE.

To the extend that McClung knew of contraband found in the defendant's home, that knowledge rested exclusively on information conveyed to him by the

Philadelphia Police (246A). Perhaps for that reason, he mistakingly asserts that all of the contraband was found behind a mirror in MR. AGNES' bathroom (id). In fact, LT. SPAN stated in his testimony at the preliminary hearing that the allegedly stolen hand gun was found in the bathroom closet at defendant's house (15A).

Thus, as inflammatory as is the evidence of contraband secreted in defendant's house, the Court's error is magnified by the fact that such evidence was admitted contrary to applicable rule of evidence and was, therefore, of doubtful accuracy.

C. DEFENDANT HAD NO OPPORTUNITY TO DISPUTE THE CONSTITUTIONALITY OF THE SEIZURE OF "CONTRABAND" OTHER THAN THE COUNTERFEIT MONEY.

The defense respectfully submits that it filed timely Motions for Suppression of all evidence seized in the search at 1819 S. 9th Street. At the suppression hearing, the Government sought to limit the discussion of proper search and seizure to the counterfeit money which forms the subject of this action. The Court consented to the Government's limitation with an explicit and unequivocal proviso that none of the items which the defense disputed in its Motions or Memoranda could be admitted into evidence without reargument and rehearing on the propriety of each item seized (108A-110A). In addition, the

defense submitted a Supplemental Memorandum of Law noting that the Government had, in its pleading and at the Suppression hearing, denied any intent to use at trial the evidence of "contraband" which the defendant claimed to have been unconstitutionally seized; with the Memorandum, the defense submitted a written stipulation to formally record the Government's intention not to use the contraband evidence seized (112A-1 to 112A-3).

At the trial, the Court reversed its position and permitted the Government to present testimony regarding all the "contraband" which the defense had disputed in its Motion to Suppress. The Court's repeated justification for denying the defense an opportunity to

litigate the constitutionality of the search was that defense counsel "opened the door" on the issue of the defendant's intent (234A. 260A, 320A). Apparently, the Court regards the cross-examination of Agent McCLUNG and the request for his opinion as to shether the defendant's behavior was consistent with innocence (See page 8,supra), as broaching the issue of the defendant's intent. Defendant contends that intent, in general, and fraudulent intent, in particular, is an express and material element of the crime charged; therefore, it si inconceivable to argue that the defense "opened the door" on this issue. Rather, defense counsel did no more than ask a witness to the search to describe the defendant's behavior so that the fact-

finder might decide his intention. Defense can only speculate as to why the Court regards cross-examination of Government witness on his recollection of a material element of the crime as a waiver of the Fourth Amendment right to be free from unreasonable search and seizure. Certainly, this is not a case like Harris v. New York, 401 U.S. 222 (1971), where the unconstitutionally-seized evidence was introduced by the Government to impeach the defendant's testimony. Nor is intent, a material element of the crime, analagous to the collateral issue of character or reputation; and defense concedes that when those issues are improperly raised by one party, they may be rebutted with similar, yet contradictory evidence in-

troduced by the opposition.

The Fourth Amendment Exclusionary Rule prohibits any use by the Government of unconstitutionally-obtained evidence. See Wolf v. Colorado, 338 U.S. 25 (1949); Elkins v. United States 364 U.S. 206 (1960); Mapp v. Ohio, 367 U.S. 643 (1961). Defendant adhered to the procedural framework set out in Rule 41 (e) Federal Rules of Criminal Procedure) for asserting and preserving its right to object to the fruits of an unlawful search. Neither the Court nor the Government has adduced any authority tending to show that the defendant waived his Fourth Amendment rights. Therefore, regardless of the correctness of the defendant's contention that "contraband" was seized in violation of the Fourth

Amendment's prohibition of unreasonable search and seizure, such evidence was improperly admitted over objection of the defendant that he was never permitted to litigate his claim of unconstitutional search.

Respectfully submitted,

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